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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 LACIE JOY ZAVALA,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL
11 SECURITY,

12 Defendant.

NO: 1:16-CV-3152-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

13 BEFORE THE COURT are the parties' cross-motions for summary
14 judgment (ECF Nos. 18 and 20). This matter was submitted for consideration
15 without oral argument. The Court has reviewed the administrative record and the
16 parties' completed briefing and is fully informed. For the reasons discussed below,
17 the Court **GRANTS** Defendant's motion and **DENIES** Plaintiff's motion.

18 JURISDICTION

19 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g),
20 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for the Commissioner's. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted);

1 *Carmickle v. Comm’r*, 533 F.3d 1155, 1162 (9th Cir. 2008) (ALJ’s error in
2 reaching conclusion is immaterial if the ALJ provided other legally sufficient
3 reasons supporting that conclusion). The party appealing the ALJ’s decision
4 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
5 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b), 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1), 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv),
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f), 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on September 13, 2012, alleging a disability
10 onset date of November 15, 2009. Tr. 18. These applications were denied initially
11 and upon reconsideration, and Plaintiff requested a hearing. Tr. 18. A hearing was
12 held before an Administrative Law Judge on December 14, 2011. Tr. 18. The ALJ
13 rendered a decision denying Plaintiff benefits on January 11, 2012. Tr. 18-36.

14 The ALJ found that Plaintiff meets the insured status requirements of Title II
15 of the Social Security Act through June 30, 2017. Tr. 20. At step one, the ALJ
16 found that Plaintiff engaged in substantial gainful activity during December 2011
17 through May 2012, but not for the remaining period. Tr. 20. At step two, the ALJ
18 found that Plaintiff had the following severe impairments:

19 cervical and lumbar spine degenerative disc disease, slight thoracic spine
20 dextroscoliosis, obstructive sleep apnea, sleep related disorder (daytime
somnolence, nightmare disorder, sleep paralysis, hypersomnia due to

1 medications), fibromyalgia, bipolar disorder, substance use disorder, obesity,
2 varicose veins, and asthma.

3 Tr. 21. At step three, the ALJ found that Plaintiff's severe impairments did not
4 meet or medically equal a listed impairment. Tr. 20. The ALJ then determined
5 that Plaintiff had the residual functional capacity to:

6 [P]erform light work as defined in 20 CFR 404.1567(b) and 416.967(b)
7 except she can occasionally balance, stoop, kneel and crouch. The claimant
8 should not crawl or climb ladders, ropes, scaffolds, ramps or stairs. She
9 should avoid concentrated exposure to vibration, hazards, heights, fumes,
10 odors, dusts, gases, and poor ventilation. The claimant can perform simple,
11 routine tasks and follow short, simple instructions. She can do work that
12 needs little or no judgment and can perform simple duties that can be learned
13 on the job in a short period. She has average ability to perform sustained
14 work activities (i.e., can maintain attention, concentration, persistence and
15 pace) in an ordinary work setting on a regular and continuing basis (i.e.,
16 eight hours a day, five days a week, or an equivalent work schedule) within
17 customary tolerances of employers rules regarding sick leave and absence.
18 She requires a work environment with minimal supervisor contact (Minimal
19 contact does not preclude all contact. Rather, it means the contact does not
20 occur regularly. Minimal contact also does not preclude simple and
superficial exchanges and it does not preclude being in proximity to the
supervisor). The claimant can work in proximity to coworkers, but not in a
cooperative or team effort. She requires a work environment that requires
no more than minimal interactions with coworkers. The claimant requires a
work environment that is predictable and with few work setting changes
(i.e., a few routine and uninvolved tasks according to set procedures,
sequence or pace with little opportunity for diversion or interruption, in
other words, low stress). The claimant requires a work environment without
public contact.

19 Tr. 23. At step four, the ALJ found that Plaintiff was unable to perform any past
20 relevant work. Tr. 34. At step five, the ALJ found that Plaintiff could perform the

1 requirements of occupations such as assembler production, cleaner housekeeping,
2 and packing line working, and that such occupations existed in significant numbers
3 in the national economy. Tr. 34-35. The ALJ concluded that Plaintiff was not
4 disabled under the Social Security Act and denied her claims on that basis. Tr. 36.

5 The Appeals Council denied Plaintiff's request for review on June 27, 2016,
6 making the ALJ's decision the Commissioner's final decision for purposes of
7 judicial review. Tr. 1-6; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

8 ISSUES

9 Plaintiff raises three issues for review:

- 10 1. Whether the ALJ failed to properly evaluate the medical opinion
11 evidence.
- 12 2. Whether the ALJ erred in failing to obtain the opinion of a medical
13 expert; and
- 14 3. Whether the ALJ properly discredited Plaintiff's symptom
15 testimony.

16 ECF No. 18 at 2.

17 DISCUSSION

18 A. Medical Expert Opinions

19 There are three types of physicians: "(1) those who treat the claimant
20 (treating physicians); (2) those who examine but do not treat the claimant
(examining physicians); and (3) those who neither examine nor treat the claimant

1 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."
2 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
3 Generally, the opinion of a treating physician carries more weight than the opinion
4 of an examining physician, and the opinion of an examining physician carries more
5 weight than the opinion of a reviewing physician. *Id.* In addition, the
6 Commissioner's regulations give more weight to opinions supported by reasoned
7 explanations than to opinions that are not, and to the opinions of specialists on
8 matters relating to their area of expertise over the opinions of non-specialists. *Id.*
9 (citations omitted).

10 If a treating or examining physician's opinion is uncontradicted, an ALJ may
11 reject it only by offering "clear and convincing reasons that are supported by
12 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
13 "If a treating or examining doctor's opinion is contradicted by another doctor's
14 opinion, an ALJ may only reject it by providing specific and legitimate reasons
15 that are supported by substantial evidence." *Id.* (citing *Lester v. Chater*, 81 F.3d
16 821, 830-831 (9th Cir. 1995)). Regardless of the source, an ALJ need not accept a
17 physician's opinion that is "brief, conclusory and inadequately supported by
18 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th
19 Cir. 2009) (quotation and citation omitted).

1 “If there is ‘substantial evidence’ in the record contradicting the opinion of
2 the treating physician, the opinion of the treating physician is no longer entitled to
3 ‘controlling weight.’” *Orn*, 495 F.3d at 632 (quoting 20 C.F.R. § 404.1527(d)(2)).
4 The phrase “substantial evidence” means “such relevant evidence as a reasonable
5 mind might accept as adequate to support a conclusion.” *Richardson v. Perales*,
6 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S.
7 197, 229 (1938)). “An ALJ can satisfy the ‘substantial evidence’ requirement by
8 ‘setting out a detailed and thorough summary of the facts and conflicting clinical
9 evidence, stating his interpretation thereof, and making findings.’” *Garrison*, 759
10 F.3d at 1012) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).

11 1. Dr. Abacan

12 Gloria Abacan, M.D., a treating physician, examined Zavala over a five
13 month period. Dr. Abacan opined that mental and chronic medical conditions
14 would prevent Zavala from maintaining a job for at least a year. Tr. 1005-06 Dr.
15 Abacan submitted a handwritten medical report—apparently drafted by Plaintiff’s
16 attorney—dated May 14, 2014 opining:

- 17
- Working on a regular and continuous basis would cause Zavala’s
18 condition to deteriorate, explaining that Zavala cannot even drive;
 - Zavala would miss some work due to medical impairments if attempting
19 to work a 40-hour per week schedule, explaining that Zavala needs to stay
20 in therapy for the alcohol and drug problems for at least a year, without
mentioning how many days of work Zavala would miss; and

- Zavala would need to lie down during the day, explaining her medication makes her sleepy and that she needs to adjust C-PAP, without mentioning how long she would need to lie down.

Tr. 1005-06. Other than stating Zavala has chronic lower back and diffuse pain, has attended rehab sessions, has varicose veins, and gets sleepy all the time, the opinion does not describe Plaintiff's signs or clinical findings, but rather lists the names of her other doctors. Tr. 1005. Dr. Abacan did not respond to the question regarding whether Zavala has physical or mental conditions that are likely to cause pain; she also stated Zavala's prognosis is fair. Tr. 1005-06.

The ALJ properly discredited Dr. Abacan's opinion, as it was conclusory, brief, and unsupported by the record as a whole. The ALJ noted that the opinion was not a function-by-function assessment, failed to explain why Zavala could not maintain a job, did not specify how long Zavala needed to lie down, and the explanations that were provided were inadequate. Tr. 31-32. The ALJ specifically noted that Zavala had completed substance abuse treatment and that Zavala's inability to drive was not related to work like activities.¹ Tr. 31-32 (citing Tr. 937).

¹ Notably, Dr. Abacan deferred to Dr. Ramzan's opinion, who did not form an opinion with respect to Zavala's capacity to work, but rather merely stated that Plaintiff is not safe to drive on the road due to daytime sleepiness and fatigue. Tr.

1 Plaintiff argues that, even if conclusory and lacking in explanation, the
2 opinion is entitled to more weight because, “consistent with Dr. Abacan’s treating
3 opinions, treatment records show that Zavala has significant low back and diffuse
4 pain due to degenerative disc disease and fibromyalgia” and suffers from daytime
5 somnolence.² ECF No. 18 at 8 (citing Tr. 364-65, 391-92, 658-61, 667-70, 702-04,
6 918-20, 970-72, 978-80, 983, 1000-04, 1108-10, 1079-81, 1083-85, 1091). While
7 it is true the record contains numerous complaints of pain of varying degrees, the
8 complaints of pain varied and are based on Plaintiff’s subjective complaints, which
9 the ALJ found not entirely credible. Moreover, the records Plaintiff cites in
10 support demonstrate Zavala was not limited in mobility; and the record otherwise
11 demonstrates Zavala was not limited in her ability to take care of herself, her child,
12 or her ailing grandfather. Of special import is the fact that neither the opinion of
13 Dr. Abacan nor Plaintiff’s motion specifically argues the underlying pain limits
14 Zavala’s ability to work beyond that assigned in the RFC. *Maldonado v. Morales*,
15 556 F.3d 1037, 1048, n. 4 (9th Cir. 2009) (arguments made in passing are waived).
16 Moreover, the ALJ proposed an RFC that takes Plaintiff’s reported daytime
17
18 925 (03/05/2014). Moreover, there is no indication Zavala had trouble making it to
19 her numerous medical appointments or her substance abuse treatments. Tr. 1006.

20 ² See n. 1 and discussion regarding Dr. Ramzan below.

1 somnolence into account by limiting Zavala to light work and limiting her from
2 working in situations where being tired could be dangerous.

3 Plaintiff also argues that the ALJ erred in finding Dr. Abacan's opinion that
4 Zavala's impairments preclude work is not entitled to weight because it is an issue
5 reserved to the commissioner. ECF No. 18 at 9. The ALJ did not merely dismiss
6 Dr. Abacan's opinion because it reached an ultimate decision; rather, the ALJ fully
7 considered the opinion and its conclusion, and found that the underlying
8 explanation was not sufficient to support the ultimate conclusion. Tr. 31-32.

9 Plaintiff finally contends that the ALJ erred in failing to make every
10 reasonable effort to recontact the source for clarification. ECF No. 18 at 10. "An
11 ALJ is required to recontact a doctor only if the doctor's report is ambiguous or
12 insufficient for the ALJ to make a disability determination." *Bayliss*, 427 F.3d at
13 1217. The opinion was not ambiguous as to its explanation of the result and the
14 ALJ found the evidence adequate to make a determination regarding Zavala's
15 disability.

16 2. Dr. Ramzan

17 Uzma Ramzan, M.D. treated Zavala's sleep apnea. Tr. 925. Dr. Ramzan
18 reported that Zavala had daytime sleepiness and fatigue and recommended that she
19 receive assistance in getting transportation to and from her home as she was not
20 safe to drive. Tr. 925. The ALJ accorded some weight to Dr. Ramzan's opinion,

1 reasoning that the vast majority of medical records do not describe the claimant as
2 appearing tired, sleepy or sedated. Tr. 31. The ALJ concluded that restricting the
3 claimant from concentrated exposure to hazards and heights and limiting her to
4 light work and simple, routine tasks and short, simple instructions adequately
5 accommodates the daytime sleepiness and fatigue. Tr. 31.

6 Plaintiff argues that her daytime somnolence is well-supported by the
7 medical record. ECF No. 18 at 11 (citing Tr. 729, 964). Notably, the record
8 includes very few objective observations of fatigue and Zavala admitted her drug
9 of choice included opiates, which cause drowsiness, and that she was not sober
10 during many of her appointments. Tr. 778. Irrespective, the ALJ properly noted
11 that Plaintiff's sleep apnea is adequately controlled by her use of the C-PAP; and
12 the reported limitations are otherwise adequately addressed in the RFC. Critically,
13 Dr. Ramzan's opinion did not specifically detail the limitations other than for
14 driving. *See Frost v. Barnhart*, 314 F.3d 359, 361 (9th Cir. 2002) (there is no
15 reason to assume inability to drive would interfere with ability to do simple work
16 that the ALJ suggested). Accordingly, the ALJ's conclusion as to Plaintiff's RFC
17 is not incompatible with Dr. Ramzan's opinion; and the ALJ reasonably concluded
18 that the record undermines Plaintiff's claims, which is a clear and convincing
19 reason for discounting the opinion.

20 //

1 3. McClure, ARNP

2 Heather McClure, ARNP,³ provided medication management services for
3 Zavala’s mental health impairments. Nurse McClure opined, without explanation,
4 that Zavala’s symptoms limit her ability to seek work at this time.” Tr. 923. The
5 ALJ assigned no weight to Nurse McClure’s opinion since she did not explain how
6 the symptoms limited the claimant’s ability to seek work or the extent to which the
7 claimant was limited. Tr. 32. Plaintiff argues that Nurse McClure did indicate the
8 extent to which Zavala’s bipolar disorder is limiting in that she explained that it
9 prevents Zavala from seeking work or working. ECF No. 18 at 12. This response
10 misses the point: there was no explanation apart from the bare conclusion; it also
11 exaggerates the opined limitations, as Nurse McClure did not say Zavala’s
12 limitations *prevented* her from working.

13 Plaintiff also argues that the ALJ erred in dismissing the opinion without
14 evaluating whether that opinion is consistent with the medical record. ECF No. 18
15 at 12. Defendant rightly notes that Nurse McClure was neither a psychologist nor
16 a physician, making her an “other source,” which an ALJ may discredit by offering
17 a germane reason for rejecting the opinion. ECF No. 20 at 16; *see Molina v.*

18
19 ³ An advanced registered nurse practitioner (ARNP) is a registered nurse who
20 completes a graduate-level education program.

1 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Failing to provide supporting
2 reasoning or clinical findings is a germane reason. *Molina*, 674 F.3d at 1111–12
3 (listing “several germane reasons” including failure to explain the bases of the
4 conclusion).⁴ The ALJ did not err.

5 4. Dr. Cooper

6 CeCilia Cooper, Ph.D., performed a psychological consultative examination
7 of Zavala in December 2012. Tr. 502-03. The ALJ accorded Dr. Cooper’s opinion
8 little to no weight, reasoning that it is not supported by the claimant’s cognitive
9 examination, activities, or by the longitudinal medical record, and that the
10 limitations were largely based on the claimant’s less than fully credible self-
11 reports. Tr. 32. Plaintiff concedes that an opinion may be discounted if based to a
12 large extent on an applicant’s self-reports where the ALJ properly finds the
13 applicant to be not credible. ECF No. 18 at 14.

14 Defendant notes that the ALJ adopted many of the limitations reflected in
15 the opinion of Dr. Cooper in that the ALJ concluded Zavala could perform simple,
16 routine tasks and follow short, simple instructions, needed minimal interactions
17 with coworkers or supervisors, needed a low-stress job, and needed a job with
18

19 ⁴ Notably, when evaluating an “other source opinion, an ALJ must consider
20 how well the source explains the opinion.” SSR 06-3p (2006 WL 2329939).

1 predictability and few workplace changes. ECF No. 20 at 14 (citing Tr. 23). As
2 Defendant correctly notes, the only limitations the ALJ did not adopt included the
3 recommendation that Zavala (1) needed close supervision to complete tasks she did
4 not like, (2) might have problems maintaining concentration for extended periods,
5 and (3) would have trouble working in quiet environments.

6 As the ALJ reasonably found, the first two limitations the ALJ did not adopt
7 were wholly supported by Zavala's self-reports and are inconsistent with Zavala's
8 history of education—which included a doctorate in pharmacology obtained in
9 May 2007—and employment.⁵ As the ALJ noted, Zavala was able to work as a
10 bus driver, substitute teacher, and waitress, and was able to take care of her
11 children and ailing grandfather.⁶ Tr. 32. The ALJ specifically noted that Dr.

13 ⁵ Dr. Cooper opined that Zavala's ability to maintain attention and
14 concentration is somewhat impaired based on Zavala's completion of several tasks,
15 but the responses do not support the conclusion, as there is no mention that she had
16 difficulty concentrating, but rather stated she was cooperative. Tr. 500-01.

17 ⁶ Plaintiff argues that working as a substitute teacher does not necessarily
18 conflict with Dr. Cooper's conclusions that she would not be capable of
19 appropriately performing this work, ECF No. 18 at 17. Even if not necessarily
20 inconsistent, it is reasonable to interpret it as such. Zavala otherwise reported to

1 Cooper did not describe Zavala as giving up on tasks during the evaluation. Tr. 32.
2 As to the third limitation, the ALJ noted that Zavala testified that noise rather than
3 quiet bothers her. Tr. 32. These inconsistencies provide clear and convincing
4 reasons for discounting the proffered opinion.

5 5. Dr. Drenguis

6 William Drenguis, M.D., performed a physical consultative examination of
7 Zavala in December of 2012. Tr. 486-93. Dr. Drenguis reviewed MRI results
8 from 2009 and X-ray results taken for the exam, and performed an examination of
9 Zavala. The ALJ assigned some weight to Dr. Drenguis' opinion that Zavala
10 could lift and carry 20 pounds occasionally and 10 pounds frequently, but assigned
11 little weight to the opinion that Zavala could only stand and/or walk for four hours
12 and sit for five hours in an eight-hour day. Tr. 30.

13 The ALJ noted that this opinion was attributed to Zavala's lumbar
14 degenerative disc disease but reasoned that this conclusion was insufficient
15 because the imaging obtained that day showed only mild degenerative disc
16
17

18 Dr. Cooper that she had lost her job at Rite Aid because she did not get along with
19 the customers, Tr. 499, but she also said she was let go because of cut backs at
20 Wal-Mart, where she worked for almost two years. Tr. 500.

1 disease,⁷ which would not reasonably be expected to cause the degree of limitation
2 he opined.⁸ Tr. 30. Moreover, the ALJ noted that Dr. Drenguis observed that
3 Zavala's station was unstable, her gait was slow, and she could not tandem walk
4 secondary to ataxia,⁹ but other records demonstrated she had normal gait and
5

6 ⁷ The ALJ's decision to rely on the most recent report is not unreasonable
7 given the intervening injection of steroids to combat the issue. Tr. 302 (MRI/CT
8 scan of back on 12/2008), Tr. 149, 389 (facet joint injection dated 04/02/2009),
9 414 (recognizing pain is better controlled after sacroiliac joint injection and facet
10 joint injection).

11 ⁸ Plaintiff complains that the ALJ is playing doctor by stating mild disc
12 degenerative disease would not result in the alleged limitation. Notably, courts
13 have found mild degenerative disc disease may cause persistent, disabling pain, but
14 the ALJ gave alternative reasons that support dismissing the opinion—namely
15 overall inconsistency with the record. *Carmickle v. Comm'r*, 533 F.3d 1155, 1162
16 (9th Cir. 2008) (an ALJ's error in reaching his conclusion is immaterial if he
17 provided other legally sufficient reasons supporting that conclusion).

18 ⁹ Notably, Plaintiff reported to Dr. Drenguis that she can stand for about 10
19 minutes or sit for about 10 minutes before she must change positions; she also
20 stated that she does not smoke or drink alcohol. Tr. 490. The record belies this

1 station. Tr. 30-31. This inconsistency is a clear and convincing reason for
2 discounting Dr. Drenguis' opinion. The ALJ's conclusion is especially reasonable
3 in light of the adverse credibility determination, which suggests Zavala may have
4 been exaggerating her limitations during this visit given the vast amount of
5 conflicting evidence in the record.

6 6. Dr. Thuline

7 State agency medical consultant Dale Thuline, M.D. reviewed the medical
8 record on March 18, 2013 and opined that the claimant should alternate sit/stand
9 after one hour due to back pain. Tr. 149. The submitted medical form requests an
10 explanation for exertional limitations and how and why the evidence supports the
11 conclusion, and requests that the examiner cite specific facts upon which the
12 conclusion is based. Tr. 149. Dr. Thuline only noted that Zavala had mild lumbar
13 DDD with a history of steroid injections without any further explanation. Tr. 149.

14 The ALJ assigned significant weight to the opinion of Dr. Thuline with the
15 exception of Dr. Thuline's opinion that Zavala should alternate sit/stand positions
16

17 report and Dr. Drenguis's functional assessment statement demonstrates he did not
18 put significant weight in Plaintiff's reported limitation. Moreover, Dr. Drenguis
19 notes that her symptoms are exacerbated by her obesity, Tr. 492, but she later lost
20 weight and was exercising.

1 after one hour due to back pain. Tr. 33. As with the ALJ's assessment of Dr.
2 Drenguis, the ALJ noted that the most recent imaging of the claimant's back was
3 described to show only mild degenerative disc disease, slight lumbar levoscoliosis,
4 and slight thoracic dextroscoliosis.¹⁰ Tr. 33 (citing Tr. 488). The ALJ also noted
5 that, while the claimant had fibromyalgia, the voluminous medical record contains
6 very few observations of the claimant changing position to relieve discomfort. Tr.
7 33.

8 The ALJ reasonably concluded that the record contradicted Dr. Thuline's
9 opinion that Zavala would need to alternate sit/stand positions after one hour given
10 very few records mentioned Zavala was uncomfortable while sitting and those
11 records only mentioned she had to shift her weight, which is not the same as
12 needing to shift stand/sit positions. Notably, as Defendant points out, Dr. Cooper
13 observed that Zavala sat for nearly 90 minutes without needing to rise. ECF No.
14 20 at 18 (citing Tr. 502). Moreover, the conclusion was supported with very little
15 explanation and without any specific evidence or facts noted other than mild
16 lumbar disk degenerative disease. The ALJ's finding that the conclusion was not
17 supported by the record is reasonable and this inconsistency is a clear and
18 convincing reason for discounting the opinion.

19
20 ¹⁰ See n. 8.

1 **B. Additional Medical Opinion**

2 Plaintiff argues that the ALJ made medical determinations beyond his
3 expertise and that the ALJ should have called upon a medical expert, rather than
4 himself making medical conclusions. ECF No. 18 at 20. Specifically, Plaintiff
5 argues the ALJ improperly determined that Zavala's psychological impairments
6 were limited to bipolar disorder and reasons that this led to an improper credibility
7 determination. This argument is without merit, as the ALJ took into account all
8 complaints regardless of the medical label. Further, the credibility determination
9 was not contingent on this finding.

10 Plaintiff also argues that the ALJ improperly evaluated imaging results, but
11 does not explain how or why this would change the outcome. Even if this
12 argument were not waived due to this cursory complaint, the argument does not
13 hold weight. The ALJ considered the imaging and Zavala's reported activities and
14 concluded, in tandem, that Zavala was not as limited as claimed. Zavala's
15 activities have implications on how limiting the underlying condition is: if
16 activities show an ability then x-ray or MRI imaging cannot contradict that ability,
17 regardless of the medical expertise needed to fully understand the underlying
18 condition. Notably, the ALJ must have some leeway in considering the medical
19 evidence and other courts have found that the ALJ did not err in finding mild
20

1 degenerative spinal conditions do not necessarily produce disabling pain. *See*
2 *Hughes v. Comm'r of Soc. Sec. Admin.*, 486 F. App'x 11, 16 (11th Cir. 2012).

3 Plaintiff also argues that the ALJ was compelled to obtain medical expert
4 testimony regarding the severity and limiting effects of Zavala's multiple
5 impairments. However, the record is replete with activities and responsibilities
6 contradicting the claimed severity, so expert testimony on this point was not
7 required.

8 **C. Adverse Credibility Determination**

9 In social security proceedings, a claimant must prove the existence of
10 physical or mental impairment with "medical evidence consisting of signs,
11 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A
12 claimant's statements about his or her symptoms alone will not suffice. 20 C.F.R.
13 §§ 416.908; 416.927. Once an impairment has been proven to exist, the claimant
14 need not offer further medical evidence to substantiate the alleged severity of his or
15 her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).
16 As long as the impairment "could reasonably be expected to produce [the]
17 symptoms," the claimant may offer a subjective evaluation as to the severity of the
18 impairment. *Id.* This rule recognizes that the severity of a claimant's symptoms
19 "cannot be objectively verified or measured." *Id.* at 347 (quotation and citation
20 omitted).

1 If an ALJ finds the claimant’s subjective assessment unreliable, “the ALJ
2 must make a credibility determination with findings sufficiently specific to permit
3 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant's
4 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In making
5 this determination, the ALJ may consider, *inter alia*: (1) the claimant’s reputation
6 for truthfulness; (2) inconsistencies in the claimant’s testimony or between his
7 testimony and his conduct; (3) the claimant’s daily living activities; (4) the
8 claimant’s work record; and (5) testimony from physicians or third parties
9 concerning the nature, severity, and effect of the claimant’s condition. *Id.* If there
10 is no evidence of malingering, the ALJ’s reasons for discrediting the claimant's
11 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d
12 661, 672 (9th Cir. 2012) (quotation and citation omitted). The ALJ “must
13 specifically identify the testimony she or he finds not to be credible and must
14 explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246
15 F.3d 1195, 1208 (9th Cir. 2001). “Inconsistencies between a claimant's testimony
16 and the claimant's reported activities provide a valid reason for an adverse
17 credibility determination.” *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014)
18 (citation omitted).

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1 Here, the ALJ detailed the claimant's testimony and medical record and
2 reasonably found that many of her daily living activities, other conduct, and the
3 medical record conflicted with the claimed severity. *See* Tr. 26-30. As the ALJ
4 reasonably found, the objective medical record contained little details supporting
5 many of the claimant's reported limitations and her daily activities seriously
6 conflicted with the claimed severity. As the ALJ noted, despite Zavala's claimed
7 limitations, she was able to take care of her ailing father; was able to hold
8 employment for a significant amount of time; reported improvements in her
9 symptoms due to physical therapy, exercise and weight loss; the voluminous
10 medical record contained very few observation of the claimant changing positions
11 to relieve discomfort; and the record was otherwise replete with observations
12 stating the claimant was cooperative, alert, pleasant, calm and able to smile, among
13 other things. *See* Tr. 26-30. The ALJ's decision closely tracked Zavala's claimed
14 limitations and provided sufficiently specific findings to conclude the ALJ did not
15 act arbitrarily. The ALJ did not err.

16 CONCLUSION

17 The ALJ did not commit any reversible error in reviewing the medical
18 opinions, not ordering additional review, and in finding Plaintiff not entirely
19 credible. Defendant is entitled to summary judgment.

20 //

1 **IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (ECF No. 17) is **DENIED**.

3 2. Defendant's Motion for Summary Judgment (ECF No. 19) is

4 **GRANTED.**

5 The District Court Executive is hereby directed to file this Order, enter
6 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

7 **DATED** July 10, 2017.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE

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Chief United States District Judge